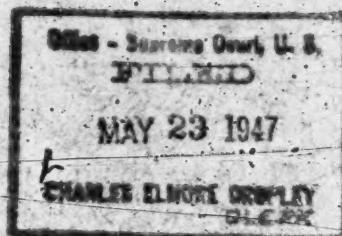


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No. 1405

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**In the Supreme Court of the United States**

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

JIMMIE IRA BROWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT

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(1)



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## **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit entered April 4, 1947,<sup>1</sup> reversing an order of the district court, which overruled respondent's motion to correct a sentence for escape—in order to have it commence to run at the expiration of the first of several consecutive sentences previously imposed against respondent, rather than at the expiration of the combined term of such sentences.

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<sup>1</sup> Rehearing denied April 25, 1947.

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**OPINIONS BELOW**

The opinion of the circuit court of appeals (R. 31-36) has been reported at 160 F. 2d 310. The opinion of the district court (R. 22-27) is reported at 67 F. Supp. 116.

**JURISDICTION**

The judgment of the circuit court of appeals was entered April 4, 1947 (R. 36), and a petition for rehearing was denied April 25, 1947 (R. 40). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

**QUESTION PRESENTED**

Whether the provision of the escape statute, requiring that a sentence for escape shall begin to run upon the expiration of any sentence under which the prisoner is held at the time of escape, requires that a sentence for escape imposed upon a prisoner who is in custody under several consecutive sentences shall begin at the expiration of the particular sentence being served at the time of the escape rather than at the expiration of the combined term of the prior consecutive sentences.

**STATUTE INVOLVED**

The Act of May 14, 1930, c. 274, § 9, 46 Stat. 327, as amended by the Act of August 3, 1935, c. 432, 49 Stat. 513 (18 U. S. C. 753h), provides:



Any person committed to the custody of the Attorney General or his authorized representative, or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General, or who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such custody or institution, shall be guilty of an offense. If the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense whatsoever, the offense of escaping or attempting to escape therefrom shall constitute a felony and any person convicted thereof shall be punished by imprisonment for not more than five years or by a fine of not more than \$5,000, or both; and if the custody or confinement is by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, the offense of escaping or attempting to escape therefrom shall constitute a misdemeanor and any person convicted thereof shall be punished by imprisonment for not more than one year or by a fine of not more than \$1,000, or both. The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. If such person be under sentence at the time of such

offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape.

#### STATEMENT

On October 26, 1945, respondent was sentenced under two indictments in the United States District Court for the Western District of Arkansas. The first indictment was in two counts and charged conspiracy to escape and attempted escape; the other charged a violation of the National Motor Vehicle Theft Act. Respondent was sentenced under the first indictment to imprisonment for one year on the second count and two years on the first count, to run consecutively in that order; and on the other indictment, he was sentenced to imprisonment for two years to begin upon the expiration of the sentences imposed under the first indictment. He was thus sentenced to imprisonment for a total of five years under both indictments. (R. 13-21.)

On November 2, 1945, while respondent was in the custody of two United States marshals who were transporting him through the State of Missouri to Leavenworth Penitentiary, he attempted to escape. He was indicted for this attempted escape in the District Court for the Western District of Missouri, and he pleaded guilty (R. 1, 3).

On January 17, 1946, he was sentenced as follows (R. 3):

It is by the court ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date, without costs.

In July 1946, respondent filed a motion in the District Court for the Western District of Missouri to correct this last sentence imposed by that court, contending that, at the time of the attempted escape, he was being held only under the one-year sentence imposed on the second count of the first indictment returned against him in the Western District of Arkansas, and that his sentence for the attempt to escape in Missouri was required to commence at the expiration of such one-year sentence (R. 10-13). He based his contention on that part of 18 U. S. C. 753h which reads as follows:

If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape.



The district court overruled the motion (R. 27). On appeal, the circuit court of appeals reversed the order of the district court and sustained respondent's contention (R. 36). The opinion of the circuit court of appeals recognizes that, in sentencing respondent for the attempted escape, the Missouri court intended to have the sentence begin at the expiration of the combined term of all three prior sentences, but holds that the court was without power to fix that condition on the ground that, under the language of 18 U. S. C. 753h, a sentence for an escape or attempted escape must begin at the expiration of the particular sentence which the prisoner is serving at the time of the escape or attempt (R. 31-36).

#### **SPECIFICATION OF ERRORS TO BE URGED**

The circuit court of appeals erred:

1. In holding that, under 18 U. S. C. 753h, a sentence for escape, imposed against a person in custody under several consecutive sentences, must begin at the expiration of the particular sentence which he is serving at the time of the escape, rather than at the expiration of the combined term of the consecutive sentences.

2. In holding that a prisoner against whom several consecutive sentences have been imposed is "held," within the meaning of 18 U. S. C. 753h, only under the particular sentence which he is serving at the time of escape, and not under the aggregate sentences.

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3. In reversing the order of the district court denying petitioner's motion to correct his sentence for attempted escape in order to have it commence to run at the expiration of the particular sentence he was serving at the time of the attempted escape, rather than at the expiration of the combined term of the consecutive sentences.

**REASONS FOR GRANTING THE WRIT**

1. The decision below achieves a result which is clearly contrary to the purpose of Congress in providing for separate punishment for escape or attempted escape. It is evident from the language quoted, *supra*, pp. 3-4, that in providing that a sentence for escape shall begin upon the expiration of or legal release from any sentence under which the prisoner is held at the time of escape, Congress intended to make certain that there would be an additional punishment for the escape, as distinguished from the offense for which the prisoner is incarcerated. Under the decision below, that intention would be frustrated in every situation where an escape is effected or attempted during the service of any but the last of consecutive sentences. The holding below achieves the anomalous result that a sentencing court may direct that a sentence or any other offense shall begin at the expiration of the aggregate term of consecutive sentences theretofore imposed, but may not do so for the offense of escape, which

Congress clearly intended to be subject to separate punishment.

2. The decision below is predicated on the assumption that the literal language of the statute compels the conclusion reached, although the result may be undesirable. We submit, however, that the language of the statute does not necessarily compel such a result. The statute provides that the sentence for escape shall begin upon expiration or legal release from "any sentence under which such prisoner is held at the time of such escape." The court below reads "held" as equivalent to "being served" at the time of the escape. We submit, however, that the two terms are not synonymous. A person in custody under several consecutive sentences is, in a very practical sense, being "held" under the combined sentences. His good time allowance is computed on the basis of the combined sentences rather than on the basis of the separate individual sentences (18 U. S. C. 710), and if he forfeits his good time allowance after the expiration of one of the several sentences, he loses the good time earned earlier on that sentence. *Aderhold v. Perry*, 59 F. 2d 379 (C. C. A. 5); *Tippitt v. Squier*, 145 F. 2d 211 (C. C. A. 9). His eligibility for parole under 18 U. S. C. 714 is also computed on the basis of the combined sentences. Hence, when the clause "any sentence under which such person is held," as used in 18 U. S. C. 753h, is read in the light of

its purpose and in the light of the practical effect of consecutive sentences on the rights of the prisoner, we think it must mean the aggregate of consecutive sentences under which the prisoner is confined at the time of escape, rather than the particular sentence which is being served at the time.

3. It is evident that the question is one of importance. The decision below casts doubt upon the validity of every existing sentence for escape or attempted escape imposed on prisoners in custody under several consecutive sentences. Moreover, the construction adopted by the court below affects future sentences for escape, and it is important that the meaning of the statute be definitely settled.

#### CONCLUSION

Since the construction of the escape statute adopted by the court below is contrary to the obvious intent of Congress in providing for separate punishment for escape, and since, in our opinion, such construction is not compelled by the literal language of the statute, we respectfully submit that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,  
*Acting Solicitor General.*

MAY 1947.